

FILED IN UNITED STATES DISTRICT  
COURT, DISTRICT OF UTAH

Bruce M. Ewert, Pro Se  
[bewert@gmail.com](mailto:bewert@gmail.com)  
Box 324  
Salt Lake City, UT 84110  
385.267.3801

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IN THE UNITED STATES DISTRICT COURT  
FOR THE STATE OF UTAH

SEP 05 2017

U.S. DISTRICT COURT

Bruce M. Ewert, Plaintiff

COMPLAINT FOR  
PATENT INFRINGEMENT AND  
BREACH OF CONTRACT

V.

Netpulse, Inc. ("VA/Netpulse")

JURY TRIAL DEMANDED

Johnson Health Tech North America, Inc.

Life Fitness, Inc.

Case: 2:17-cv-00995

Assigned To : Waddoups, Clark

Assign. Date : 9/5/2017

Description: Ewert v. Netpulse et al

Active Theory, Inc. ("Bitgym")

Defendants

Plaintiff Bruce Ewert ("Ewert") hereby alleges against defendants VA/Netpulse, Johnson Health Tech, Life Fitness, and Bitgym, on personal knowledge as to his own activities and on information and belief as to the activities of all others, as follows:

**THE PARTIES**

1. Plaintiff Ewert is an individual having his primary place of residence at 322 University St., Apt. 8, Salt Lake City, UT 84102

2. On information and belief, Netpulse ("VA/Netpulse") is a corporation with its headquarters located at 560 Fletcher Dr., Atherton, CA 94027. Netpulse acquired Virtual Active, Inc., the original master patent licensee.

3. On information and belief, Johnson Health Tech North America, Inc. is a Wisconsin corporation headquartered at 1600 Landmark Dr., Cottage Grove, WI 53527.

4. On information and belief, Life Fitness, Inc. is a corporation headquartered at 9525 Bryn Mawr Ave, Rosemont, IL 60018.

5. On information and belief, Active Theory, Inc. ("Bitgym") is a Delaware corporation headquartered at 2081 Center Street, Berkeley, CA 94704. Berkeley, CA 94704.

### **JURISDICTION AND VENUE**

6. This action arises under the patent laws of the United States. Subject matter jurisdiction is conferred on this Court by 28 U.S.C. para 1331 and 1338(a)

7. This action also arises under a breach of a contract by the defendant VA/Netpulse and of contracts between VA/Netpulse and any and all sublicensees.

8. Venue is proper in this Court under 28 U.S.C. para 1391(b), 1391(c), and/or 1400(b). Defendants VA/Netpulse, Johnson Health Tech, Life Fitness and Bitgym are alien corporations who have committed acts of infringement in the judicial district.

### **BACKGROUND**

9. Bruce Ewert ("Ewert") invented dynamically variable rate video in 1995. He used exercise equipment as the video playback speed controller as well as a simple graphic slider for demonstration purposes. The slider controlled version was downloadable as the XPlayer. No one had demonstrated video playback speed control in real time before this, especially not with exercise equipment control. He originally designed the system in 1988 and then wrote the first dynamic variable speed video control in C on the 3DO Multiplayer, working in his room at the Buckhorn Employee Dormitory while nursing a broken leg suffered when working for the Alta Ski Patrol in the spring of 1995. He later created the PC version in C++ in the basement of his apartment in Sandy, UT, see news articles regarding Ewert and his patented technology here: <http://www.deseretnews.com/article/809241/Patent-pointers.html?pg=all> and [http://www.wardcomm.com/01\\_downloads/tech/Computer-savvy%20Jock.pdf](http://www.wardcomm.com/01_downloads/tech/Computer-savvy%20Jock.pdf)

10. Patent number 6004243 entitled "Dynamic real time exercise video apparatus and method" was filed on Oct. 4, 1996 and granted on Dec. 21, 1999.

11. Patent number 6142913 entitled "Dynamic real time exercise video apparatus and method" was filed on Nov. 3 1999, granted on Nov. 7, 2000 and expires on Nov. 3, 2019. This patent is shown in Exhibit 1.

12. See <http://patents.justia.com/inventor/bruce-ewert> for copies of the above patents.

13. Ewert's technology was deemed so innovative that he was invited to demonstrate it to the board of Panasonic NA, the Multimedia Division of Microsoft, and several fitness companies, including Stairmaster, Icon, and others. Icon even included a demonstration model in their "back room" at a large fitness show, privately showing it to Sears and other large customers.

14. Dynamically variable video rate technology was not widely available until several years later when the Microsoft Visual C++ API introduced the IMediaSeeking::SetRate method, which performed essentially the patented algorithm “under the hood”. See <https://msdn.microsoft.com/en-us/library/windows/desktop/dd407039>

15. Bell Sports Blackburn division licensed the patent and purchased product from IXR, Inc., releasing the Blackburn Motivator in 2000. Ewert assembled a team and designed and produced the hardware and software, with Blackburn providing the retail packaging. See <https://web.archive.org/web/20010202070500/http://exerscape.com:80/> and <https://web.archive.org/web/20031220090435/http://www.exerscape.com:80/html/press14.html>

16. John Ford (“Ford”) visited Bruce Ewert in Bend, OR in early 2006 to discuss licensing the patented physio-interactive video technology.

17. Ewert has emails from Ford as [jford@balancedsf.com](mailto:jford@balancedsf.com) concerning the patented technology going back to April, 2006.

18. Ford first utilized the technology in “Spinning” studio classes named Connect18 under the umbrella vafitness.com in April, 2006..

**19. Ford requested an exclusive patent license agreement that could be sub-licensed to other companies from Ewert. This agreement was signed and dated Oct. 3, 2008. It provided for a minimum payment of \$1000 per month, or 5% of license fees, whichever was greater. The agreement, as amended in 2011, is attached as Exhibit 2.**

20. On Feb. 24, 2010 Virtual Active and Matrix Fitness announced the 7xe + Virtual Active cardio equipment line. “The new line of cardio equipment features a fully interactive virtual reality experience that uses real video in real locations...**If the user speeds up or slows down, the video playback will automatically adjust to reflect their new speed...**What is truly revolutionary about this interactive experience is that it uses real video from real locations. ... the patented technologies that drive the real video interactivity are based on simple and proven video playback hardware.” Matrix is a brand of Johnson Health Tech, and a sublicensee of VA Fitness. Ewert was paid a percentage of royalties.

21. VA Fitness was acquired by Netpulse, Inc. in November of 2011.

22. On March 15, 2012, Life Fitness introduced LifeScape. “Lifescape features interactive, high-definition hikes, runs and bikes through famous locations around the world with integrated machine controls that **adjust video speed to that of the exerciser...**” Life Fitness is a sublicensee of VA/Netpulse and Ewert was paid a percentage of royalties.

23. Ewert turned in his 135,000 shares of Virtual Active in June, 2013, receiving shares of Netpulse in return.

24. Ewert has well over 100 emails between John Ford at john@vafitness.com and himself dating back to 2009.

25. Ewert has regular emails for Netpulse accountant Diane Ryczek [dryczek@netpulse.com](mailto:dryczek@netpulse.com) concerning quarterly licensing fee payments through February, 2017, when Tom Proulx stepped in and took over communications with Ewert.

26. Tom Proulx ("Proulx") is a co-founder and chairman of Netpulse. He also founded Intuit. Proulx joined Netpulse in 1997 and took over the company by buying the assets out of bankruptcy in 2001. When Ewert asked Ford who Proulx was he stated in a Feb. 21, 2017 email that "Tom is like a part time CFO." See <http://www.netpulse.com/board>.

27. Quarterly licensing fees were paid to IXR and then Ewert after IXR was dissolved consistently from 2008 through December of 2016, with the Q3 2016 payment.

28. In February, 2017, when the Q4 payment was due, Proulx took over communications from Ryczek and refused further payments, stating the termination notice. **Although notice was given of termination (The Termination Notice is shown in Exhibit 3), VA/Netpulse and all sublicensees continued to produce, promote, and sell licensed products, constituting a breach of contract and patent infringement.**

29. Ewert was provided a statement showing that VA/Netpulse made over \$3.4M from the licensed patents through 2016. This statement shows several quarters with no payments from Life Fitness even though Life Fitness was selling licensed products.

30. Life Fitness and Johnson Health Tech were the two main sub-licensees of the patented technology. Both continue to produce, promote and sell licensed products. A newer company named BitGym also seems to be involved with VA/Netpulse, with John Ford investing in them and BitGym licensing from VA/Netpulse.

31. Life Fitness has at least 25 current titles falling under the licensed patent according to an email from Life Fitness employee Michael Kamin.

32. Although both Ford and Proulx claimed that they had made large buyout deals with all sub-licensees resulting in bulk license payments ending in late 2015 for LF and early 2016 for Johnson Health Tech, Ford stated Life Fitness continued to make payments through at least the end of 2016, payments which were shown in a spreadsheet provided to Ewert. **These "buyout deals" were not disclosed to Ewert until March, 2017. There was no mention of them in the August 1, 2016 termination notice, even though the sublicenses were to run through the patent expiration in 2019.** The "buyout" payments from LF were similar to their quarterly royalty payments, not far larger. These payments are to cover royalties going forward to November 3, 2019.

33. **Ewert would not have agreed to license his patent in such a manner if he was ever informed of the agreements.**

34. The royalty financial statement from Proulx shows payments from LF of \$155,133.33 in 2016, incongruent with Proulx's email stating "Regarding the buyout payments, according to Proulx Life paid their buy-out in two payments which were the majority of the payments VA received from Life in Q3 2015 and Q4 2015 (\$182,484.44 and \$190,071.11), respectively"

35. Mr. Ford emailed a Termination Notice to end licensing as of Oct. 1, 2016 per Article VI of the 2008 licensing agreement: **"Licensee may terminate this Agreement, in its entirety or as to any particular patent or patent application within the Patent Rights, or as to any particular Licensed Product, at any time by giving Licensor at least sixty (60) days prior written notice. From and after the effective date of a termination pursuant to the previous sentence with respect to a particular patent or patent application, such patent or patent application in the particular country shall cease to be within the Patent Rights for all purposes of this Agreement, and all rights and obligations of Licensee with respect to such patent or patent application shall terminate."** This clause was breached and all previously legally licensed products continue to be sold constituting patent infringement.

36. The Aug. 2, 2016 Termination Notice email: "Bruce - I hope all is well for you and that you're still getting enough skiing in. I wanted to let you know that we've sold all the licenses that we're going to sell at this point for the technology. We're supposed to give you 60 days notice of termination per the agreement, so this serves as that notice. Hope you have some luck with licensing the tech to others in the future. It's been a great run and I was glad to be able to get you a return on your work. Best, John"

37. VA/Netpulse and all sub-licensees continue to sell licensed product in Utah and the rest of the US, both at retail and over the Internet.

38. **VA/Netpulse has breached the contract and committed patent infringement by continuing to sell licensed product, through the vafitness.com website and allowing their sublicensees Life Fitness, Johnson Health Tech brands and Bitgym, to continue to produce, promote and sell licensed products past VA/Netpulse's own stated termination date of Oct. 1, 2016.**

39. VA/Netpulse has also breached the contract by not making licensing fee payments to Bruce Ewert for Q4, 2016, Q1, 2017, and Q2, 2017 even though they continue to produce and sell identical products to those licensed.

40. Sublicensees Life Fitness, Johnson Health Tech and Bitgym (with Virtual Active: Bit Gym Edition) continue to commit patent infringement as their sublicense rights were terminated as of Oct. 1, 2016 according to the Termination Notice given Ewert by Ford.

41. See <https://www.vafitness.com/pages/faq>: "...the Virtual Active: Bit Gym Edition App is speed interactive, meaning the **video speed changes** to match the speed you run, hike, or cycle."

42. See sub-licensee Life Fitness website

<https://www.lifefitness.com/pressreleases/life-fitness-introduces-exclusive-interactive-workout-landscapes-with-ondemand-content> "Lifescape features interactive, high-definition hikes, runs and bikes through famous locations around the world with integrated machine controls that **adjust video speed** to that of the exerciser, and resistance to match the terrain."

43. See sub-licensee Johnson Health Tech website <http://world.matrixfitness.com/en/about-us> Note Netpulse and Virtual Active paragraphs regarding partnerships.

44. See sub-licensee Johnson Health Tech website <https://www.johnsonfit.com/passport> and <https://www.vafitness.com/blogs/news/4907592-introducing-the-passport-player> "Passport is the first Virtual Active offering that interacts directly with home fitness equipment. The set-top media player features HD Virtual Active programs that communicate wirelessly with select Livestrong and Advanced Fitness Group equipment (the LSPRO2 and AFG 7.1 AT, respectively), adjusting the treadmill's incline to match the climb you see on your television, and **adjusting the playback speed of the video to match the speed you set on your treadmill.**" Johnson Health Tech also owns Matrix Fitness, a known sublicensee. **Mr. Ewert was never made aware of any sub-license with Johnson Health Tech regarding the Passport Player.**

45. Ewert was never informed about sub-licensee Bitgym: <https://www.bitgym.com/> "**Experience every step thanks to our patented speed interactive technology**" When Ewert asked Proulx about it Proulx stated they were just using the content, not the patented technology. According to <https://www.vafitness.com/pages/faq> "...the Virtual Active: Bit Gym Edition App is speed interactive, meaning the **video speed changes to match the speed** you run, hike, or cycle." Ewert was never made aware of any sub-license with BitGym.

46. John Ford personally invested in Bitgym in August, 2013, see <https://twitter.com/virtuallyactive/status/372461051763126272> "I backed BitGym: Interactive trails, tours and classes for your cardio on @kickstarter! [http://www.kickstarter.com/projects/acgourley/bitgym ... #fitness](http://www.kickstarter.com/projects/acgourley/bitgym...#fitness)"

47. When sublicensing VA never followed part of clause 3.6 of the License Agreement: "Payments. ...In the event that Licensee grants a sub-license to a 3rd party that is not an affiliate, the **Licensee shall forward 50% of any royalty advance received from the sub-licensee to the Licensor.**" These payments were never received, although Johnson Health Tech is shown to have made a \$250,000 payment to VA in Q3 2009, well in advance of the Feb. 24, 2010 of the introduction of the first Matrix-Virtual Active product. This is a breach of the contract by VA/Netpulse.

48. Last communication at end of March, 2017: "Yes, I did. And I responded that we can't breach an agreement that we are no longer a party to (because it terminated on 10/1/17, 60

days after John Ford gave you notice on 8/2/17). To which you told me I was stupid. VA has overpaid you by \$33,285.89 (assuming Life and Matrix and Smooth used your patent which I've now come to understand they do not and probably never did). I don't understand why you say that's a bluff. It's not a bluff; it's simply the math, which I shared with you in detail. Add up all the collections VA has gotten from sub-licensees. Multiply by 5%. Compare that to the total of all payments made to you. The sum of all the payments is \$33,285.89 too high. And no more money will ever come in from any sub-licensees so that amount can never come down. The clock is ticking? I do not understand what you want me to do. Please tell me very clearly." While the agreement was terminated no licensee or sublicensee ever terminated production, promotion and sale of licensed products as required in Article VI Term and Termination. This is both a breach of contract and ongoing patent infringement.

49. Proulx in a March, 2017 email stated: "I don't know what else I can do for you. I gave you the detailed history of our collections and payments to you. There's no other documentation I can provide you. The math is the math." Netpulse continued to receive royalty payment through at least the end of 2016, as Ford stated.

50. In a Mar. 19, 2017 email Proulx states "I'm just reading the patent now for the first time and I'm confused as to what exactly it covers." This patent was part of the assets Netpulse purchased when they acquired VA in November, 2011. One would assume that Proulx educated himself about one of the most important assets Netpulse would acquire from Virtual Active.

51. Proulx refuses to provide any other documentation than a spreadsheet that is missing several quarters of royalties from Life Fitness and shows continuing payments from Life Fitness through 2016 even though the buyout supposedly was complete by the end of 2015. He refuses to provide any sub-licensing contracts, communications with sub-licensees, etc. stating they are confidential.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Ewert prays for the following relief:

- a. Declaring that United States Patent 6,142,913 was duly and legally issued and is valid
- b. Entry of a motion for discovery under FRCP Rule 26 "Duty To Disclose; General Provisions Regarding Discovery" This includes all communications, including emails, between VA/Netpulse and all sublicensees; copies of all contracts between VA/Netpulse and all sublicensees; records from the sublicensees of any and all payments made to VA/Netpulse and any other relevant materials and records.
- c. A final and permanent injunction under 35 U.S.C § 283 restraining the defendants from production, promotion and sale of all previously licensed products and any similar infringing products.
- d. Treble damages from VA/Netpulse pursuant to 35 U.S.C § 284 or any and all payments received after the illegal and unreported long term license agreements with any and all sublicensees were consummated that were not paid pursuant to Clause 3.6

of the License Agreement stating that 50% of all royalties payments received shall be forwarded to the licensor.

e. Damages from all sub-licensees pursuant to 35 U.S.C § 284 for any and all licensed product sold after the termination date of Oct. 1, 2016 that are adequate to compensate Ewert for the infringement, but in no event are less than a reasonable royalty for the use made of the invention by each infringer, with interest and costs.



Bruce Ewert